Case No. 48701-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT GUNN, a single man, Respondent,
vs.

TERRY L. RIELY and PETRA E. RIELY, Husband and Wife and their Marital Community and all Persons Claiming Any Legal or Equitable Right, Title, Estate, Lien or Interest in the Property Described in the Complaint Adverse to Plaintiff's Title, or Any Cloud on Plaintiff's Title Thereto, Appellants.

BRIEF OF RESPONDENT

BELL & DAVIS PLLC

By:
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Attorney for Respondent

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I. INTRODUCTION

On remand the Trial Court awarded Respondent $459.00 in damages ($153.00 stipulated damages and then trebled), $418.60 in statutory costs and $17,500.00 in attorneys' fees based upon equitable principals. It denied Appellants' motions for retaxation of costs and to be declared as the prevailing party (CR 68 and RCW 4.84.250).

II STATEMENT OF CASE

Robert Gunn filed suit for damages to 107 trees wrongfully cut down by Riely and to quiet title in his property from Rielys' claim to an access easement. CP 314, 325. Before trial, Gunn and Riely twice mediated the matter however the settlements failed because Riely refused to give up their claim to an easement through Gunn's property. CP 43, 64, RP 20-22. Before trial, Riely submitted an offer of judgment and a settlement offer. CP 267, 269. However neither addressed their claim to an easement through Gunn's property and therefore Gunn was forced to litigate the easement claim. CP 42 – 61.

At the start of trial the parties stipulated to the value of the cut trees. CP 42. The only issue for trial was Riely's claim to an easement through Gunn's property. However, Riely's failed to properly plead their

implied easement claim and because of that the Trial Court refused to consider that claim. It did, however, allow Riely to present evidence on that issue as a defense.

Following a two day non-jury trial the Trial Judge ruled in part:

a. The issue was whether or not the Rielys had obtained any right to use with regard to that grassy pathway. CP 182, 279

b. He confronted the Rielys, and, for the first time in the trial testimony, actually went on to their property to do so. He was described as being hostile. During this confrontation Mr. and Mrs. Riely again contended that they had the right to use the grassy path. Mrs. Riely in fact ended up by saying "we'll see you in court," this testimony by Mr. Gunn was not denied. CP 183, 279 - 280;

c. One thing is now clear after hearing all of the testimony is there is not an easement for anybody over the grassy lane. CP 184, CP 280

d. In this case, the acts were clearly intentional, and my understanding of the facts they were unreasonable because the Rielys had every reason to believe that they had no right to do what they were doing. And as I said before, even if there was some arguable basis for thinking

they had an easement, trashing the property was not an alternative. They knew they had no authorization to do this. CP 193, CP 286, RP 236-237.

Based upon those and other findings, the Trial Court found liability under RCW 4.24.630 and awarded damages and attorney's fees.

With regards to the amount of attorney fees awarded the Trial Court had before it the detailed declaration of Gunn's trial counsel, CP 291-306. In his declaration, Mr. Mullins documented 250 hours spent on the case but limited the fees sought saying:

> "of the total time, about 140 hours were spent on the trespass and removal of timber aspect of the case. Of this, nearly 100 hours of time was billed at $175 per hour, for fees of $17,380.48, for the trespass and timber removal portions of this case. I rely on Judge Taylor's discretion as to the reasonable assessment of attorney's fees."...

CP 291. Based upon this declaration and his overseeing and ruling on the case, the Trial Court ruled:

> "The court finds that $175 per hour is a very reasonable rate for Mr. Mullins based on skill and experience, and that 100 hours is a reasonable amount of time to devote to proving the trespass claim, and $17,500 in fees is awarded."...

CP 289.

Riely sought reconsideration of the Trial Court's ruling. CP 334. In its ruling denying reconsideration, the Trial Court ruled:

> "The defendants here knew they did not own the land where the trees were cut, and had been warned repeatedly that they did not have an easement either. They did not make even a minimal investigation to verify whether the easement they claimed existed, but went ahead and authorized their contractor to remove over 100 saplings, which had a total value of $153."....

CP 336.

This Court reversed the Trial Court application of RCW 4.24.630 finding only RCW 64.12.030 applies and remanded to the Trial Court "to determine damages under RCW 64.12.030, the timber trespass statute." ***Gunn v. Riely***, 185 Wn. App. 517, 344 P.3d 1225, 1230 (2015), ***review denied***, 183 Wn.2d 1004, 349 P.3d 857 (2015). Concerning attorney's fees, the Court of Appeals ruled "Because we are reversing the Trial Court's judgment, Gunn is not entitled to attorney fees unless the Trial Court determines that such fees are appropriate under the timber trespass statute. 185 Wn. App. at 532-533, 344 P.3d at 1233.

On July 17, 2015 Riely filed their Motion to Determine Damages Following Remand. CP 228 – 250. They argued "[b]ecause RCW 64.12.030 does not provide for attorney's fees and costs, and litigation costs to Robert Gunn, those items of damages cannot be awarded under RCW 64.12.030." CP 231. Gunn countered that based upon the Trial Court's findings and conclusions, and the fact it specifically found Rielys' easement claim unreasonable and their trespass intentional and wrongful,

that he was entitled to treble damages and an attorney fee award in equity. CP 223-227.

The Remand Court awarded the stipulated damage of $159.00 which, pursuant to RCW 64.12.030, was tripled to $459, CP 166, and statutory costs. CP 169. Expert witness fees were not allowed. CP 169.

The Remand Court awarded Gunn attorney's fees of $17,500.00 in equity. CP 167-168. Acknowledging RCW 64.12.030 does not provide for attorney's fees, CP 167, it ruled that Rielys' conduct, as found by the Trial Court, amounted to "bad faith, willful misconduct or wantonness" citing ***Baird v. Carson***, 59 Wn. App. 715, 719, 801 P.2d 247 (1990). CP 168. Referencing the Trial Court's ruling set forth above, the remand court stated:

> "The Trial Court reached this conclusion after finding that, over a ten year period, at least five confrontations occurred between the Plaintiff and Defendants regarding their unauthorized use of the "Plaintiff's property. The Court found that there was no easement of record and indicated that the Defendants could have learned that fact from a review of their deed, preliminary title insurance commitment and title insurance policy.
>
> The Court finds that the conclusion of law specifically, and many of the findings and conclusions generally, support a finding that the Defendant's conduct rose to the level of bad faith, willful misconduct or wantonness. Consequently, attorney fees in the amount of $17,500.00 are awarded to the Plaintiff."...

CP 168.

Riely moved for reconsideration of the attorney fee award. CP 155-164. They argued the Remand Court went beyond the law of the case in awarding attorney's fees in equity and that equitable relief is precluded because it was not argued before the Trial Court or prior Appellate Court and damages of $459.00 under RCW 64.12.030 provided an adequate legal remedy. CP 155-160.

The Trial Court on the issue of adequacy of damages under RCW 64.12.030 had previously opined: "It is the opinion of the Court that to award the Plaintiff trebled stumpage value of $459, under these circumstances, would be an improper application of RCW 64.12.030, the provisions of which do not in fact provide damages which cover this situation." CP 337.

Regarding Rielys' claim they were the prevailing party based on their settlement offer and offer of judgment, the remand court ruled:

> "Defendants are not the prevailing party and are not entitled to an award of attorney's fees because neither their settlement offer (RCW 4.84.250) nor offer of judgment (CR 68) addressed Plaintiff's quiet title equitable claim which compelled Plaintiff to proceed to trial and on which theory he was successful."...

CP 21.

III. ARGUMENT

A. Standard of Review. A Trial Court's findings of fact are considered verities on appeal so long as they are supported by substantial evidence. Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. ***Katare v. Katare,*** 175 Wn.2d 23, 283 P.3d 546 (2012). [W]here there is conflicting evidence, the Court needs only to determine whether the evidence viewed most favorable to respondent supports that challenged findings. ***In re Estate of Lint,*** 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Appellate Courts defer to the Trial Court's assessment of witness credibility and evidence weight. ***In re Welfare of Sego,*** 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). It will not substitute its judgment for that of the Trial Court, even if it might have resolved the factual dispute differently. ***Sunnyside Valley Irrigation Dist. v. Dickie***, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Evidentiary rulings are viewed under the abuse of discretion standard. ***Havens v. C&D Plastics, Inc.,*** 124 Wn.2d 158, 168, 876 P.2d 435 (1994). Challenges to a Trial Court's conclusions of law are reviewed de novo. ***Robel v. Roundup Corp.,*** 148 Wn.2d 35, 59 P.3d 611 (2002).

Unchallenged findings are verities on appeal. ***In re the Estate of Jones,*** 152 Wn.2d 1, 8, 93 P.3d 147 (2004). RAP 10.3(g). Unchallenged

conclusions of law become the law of the case. ***King Aircraft Sales, Inc. v. Lane,*** 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

An Appellate Court can decide a case on any legal theory established by the pleadings and supported by the proof, regardless of the theory applied below. ***Deep Water Brewing v. Fairway Resources Ltd,*** 152 Wn. App. 229, 215 P.3d 990, 1005 (2009); ***Barber v. Peringer***, 75 Wn. App. 248, 254, 877 P.2d 223 (1994).

B. Remand Court's Authority to Award Attorney's Fees in Equity. The Remand Court had authority to award fees in equity. The Appellate Court invited such a decision when it remanded the question of whether attorney's fees could be awarded under RCW 64.12.030, the timber trespass statute. ***Gunn v. Riely***, 185 Wn. App. at 532-533. On its face that statute does not provide for attorney's fees. ***Tatum v. R & R Cable, Inc.,*** 30 Wn. App. 580, 585, 636 P.2d 508 (1981). The only possible way for Gunn to be awarded attorney's fees is through equity. Therefore, if this Court did not intend for the Remand Court to look at equitable theories for awarding fees, it would have ruled only statutory fees were available and not remand the issue for an independent review at the trial level. To have done so would have been a waste of everyone's time and money.

Similarly, the fact the equitable theory was not argued at trial or during the first appeal does not preclude its argument on remand under the law of the case doctrine. That doctrine generally holds that a decision rendered in a former appeal of a case is binding in a later appeal. However, "after the mandate has issued, the Trial Court may, however, hear and decide post judgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the Appellate Court." ***Yurtis v. Phipps,*** 143 Wn. App. 680, 181 P.3d 849, 855 (2008). The equitable attorney fee award theory was not before and therefore not decided by the first appeal. Thus, the law of the case doctrine does not apply. ***Columbia Steel Co. v. State,*** 34 Wn.2d 700, 706, 209 P.2d 482, 486 (1949), ***cert. denied,*** 339 U.S. 903, 70 S.Ct. 516, 94 L.Ed. 1332 (1950).

Additionally, the remand order was "open-ended" allowing the Remand Court to revisit issues that were not subject to an earlier appeal. ***State v. Kilgore,*** 181 Wn.2d 117, 330 P.3d 190 (2014)(citing RAP 12.2). An equitable award of attorney's fees was not argued at trial and not subject to the first appellate review. Gunn did not need to argue the equitable theory before because the Trial Court applied a statute with an attorney fee provision. Just as Riely now argues it had no chance to argue its claim for attorney's fees at trial and therefore is not barred from now

making a claim for them, ***Brief of Appellant*** at 47, the same applies to Gunn. Neither the Trial Court nor the first appeal considered an award of attorney's fees based on equity; the Remand Court was free to entertain a different theory for the award of attorney fees. ***State v. Barberio,*** 121 Wn.2d 48, 49-51, 846 P.2d 519, 520-21 (1993).

The Remand Court correctly exercised its discretion and looked at what damages to award and if attorney fees should be given in equity.

C. Attorney's Fees Properly Awarded in Equity. Although attorney fee awards are generally reviewed de novo, ***Gander v. Yeaher,*** 167 Wn. App. 638, 282 P.3d 1100 (2012), because the Court of Appeals invited on remand an attorney fee award in equity its review should be limited to whether the Remand Court abused its discretion. ***Mahler v. Szucs,*** 135 Wn.2d 398, 435, 957 P.2d 632 (1998)("Fee decisions are entrusted to the discretion of the trial court"). On the question of abuse this Court has stated:

> "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. . . Where the decision or order of the trial court is a matter of discretion, it will not be

> disturbed on review except on a clear showing of abuse of discretion, that is . . . discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons."..

State v. Batten, 16 Wn. App. 313, 314, 556 P.2d 551 (1976). Put another way, an abuse of discretion would exist only if "[n]o reasonable man would take the view adopted by the Trial Court." ***Murray v. Murray,*** 4 Wn. App. 572, 573, 483 P.2d 139 (1971).

The Remand Court properly awarded attorney's fees based upon a recognized ground in equity providing for fee recovery. ***Dayton v. Farmers Ins. Group,*** 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Gunn's suit involved both a legal claim for damages which base amount was stipulated to before trial, and an equitable quiet title action, which was the subject of the actual trial. Gunn won at trial. CP 116-117. Equity awards attorney's fees when the losing party's conduct arises to bad faith, willful misconduct or wantonness. ***Public Utility Dist. No. of Snohomish County,*** 86 Wn.2d 388, 545 P.2d 1 (1976), ***Baird v. Carson,*** 59 Wn. App. 715, 719, 801 P.2d 247 (1990); ***See also, Rogerson Hiller Corp. v. Port of Port Angeles,*** 96 Wn. App. 918, 982 P.2d 131 (1999). "Bad Faith" is defined as dishonesty of belief or purpose. ***Black's Law Dictionary*** 56 (2nd Pocket ed. 2001). It is also defined as an intentional wrongful act. ***Francis v. Wash. State Dep't of Corrections,*** 313 P.3d 457, 464 (2014). "Wantonness" is defined as conduct indicating that the actor is aware of

the risks but indifferent to the results. ***Black's Law Dictionary*** 758 (2nd Pocket ed. 2001). ***See also, Evans v. Miller,*** 8 Wn. App. 364, 367, 507 P.2d 887 (1973) where the Court quotes ***Adkisson v. Seattle,*** 42 Wn.2d 676, 684, 258 P.2d 461 (1953) in differentiating between willful and wonton misconduct:

> To constitute wilful misconduct, there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a conscious failure to avert injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Wanton misconduct is such as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury. Strictly speaking, wilful misconduct is characterized by intent to injure, while wantonness implies indifference as to whether an act will injure another.

The Trial Court at least twice found Riely's actions intentional and very unreasonable. CP 286, 336. It made ample findings of fact establishing Rielys' bad faith and willful and wantonness actions justifying fees. CP 275-290. Riely had no basis to claim an express easement over Gunn's property. CP 280. They also knew Gunn contested any claim by them to a right of way through his property. CP 289. Gunn had confronted Riely at least five times over a ten year period and told

them they had no right to cross his property. CP 168, 277 (Finding of Fact 1.14). Even with this knowledge Riely did no reasonable investigation to determine if they had a basis to claim an easement. CP 336. Instead, Riely waited until Gunn was out of state to contract with a well driller and directed them to cut Gunn's trees to open up the grassy path. CP 279, RP 73-75.

Based on these actions the Trial Court found Riely acted intentionally and unreasonably in trespassing onto Gunn's property and cutting his trees. CP 286. This malicious conduct required Gunn to sue and incur tens of thousands of dollars in attorney's fees to stop this unprovoked intrusion and damage to his property.

Additionally, throughout the litigation Riely refused to admit they had no access rights through Gunn's land. CP 42-45. This necessitated the trial for Gunn to stop future trespass. The Trial Court clearly found their conduct to be willful, wanton and in bad faith.

Riely attempts to limit an equitable award of attorney's fees to wrongfully issued temporary injunction cases. ***Brief of Appellant*** at 15-16. However, equity covers undefinable and unspecified situations that Court's face in our ever changing times and the cases Riely cites do not stand for the proposition that equity only awards attorney fees where injunctive relief is involved.

The Remand Court justifiably used the Trial Court's rulings to award Gunn attorney's fees in equity. Equitable fee awards are based upon parties conduct as found after trial. A person who is unjustly required to pursue or defend an unreasonable claim has a right to an award of attorney's fees against the offending party.

D. The Amount of Attorney's Fees was supported by the Record. The Trial Court found $17,500.00 a reasonable award of attorney's fees based upon trial counsel's declaration. The Trial Court noted that damages were stipulated to before trial; the entire hearing was presentation of evidence concerning Gunn's trespass claim and Riely's implied easement defense. In its ruling on the fee amount the court stated:

> "The Court finds that $175 per hour is a very reasonable rate for Mr. Mullins based on skill and experience, and that 100 hours is a reasonable amount of time to devote to proving the trespass claim, and $17500 in fees is awarded."...

CP 289. Trial counsel had already excluded non-trial related issue time from his fee claim:

> "3. The attached invoicing shows about 250 hours on this case, including all issues, among which were the trespass and removal of timber. Of the total time, about 140 hours were spent on the trespass and removal of timber aspect of the case. Of this, nearly 100 hours of the time is billed at $175 per hour, for fees of $17,380.48 for the trespass and timber removal portions of this case. I rely on Judge Taylor's discretion as to the reasonable assessment of attorney's fees."..

CP 291. Both Gunn's trial counsel and the Trial Court segregated the fees; the award was based solely on the issues dealt with at trial. The Trial Court used its discretion to award fees which amount is amply supported by the record and its own findings. The Remand Court simply followed the Trial Court because the Trial Court was in the best position to make such determinations. It heard a two day trial, observed the witnesses and made substantial simple clear findings. There was nothing before the Remand Court or presently before this Court to say the award was an abuse of discretion.

Rielys' argument that the findings of fact are insufficient to support an award in equity is without basis. Sufficient findings need only address all ultimate facts and material issues. The findings must be sufficient to "inform the Appellate Court, on material issues, 'what questions were decided by the Trial Court, and the manner in which they were decided.'" ***Daughtry v. Jet Aeration Co.,*** 91 Wn.2d 704, 707, 592 P.2d 631 (1979). The Court of Appeals may refer to the Trial Court's oral opinion if the written findings themselves are inadequate to fully explain the rationale of the Trial Court. ***Port Townsend Pub. Co., Inc. v. Brown,*** 18 Wn. App. 80, 85, 567 P.2d 664 (1977). Here, the Trial Court made a detailed oral opinion, which was almost verbatim converted to written

findings and conclusions, in which he found Rielys knew from the beginning they had no express easement through Gunn's property, that they acted unreasonably in trespassing onto the property and cutting the trees; in essence their defense was frivolous. The Remand Court relied on the trial transcript, the Trial Court's rulings and also made additional findings supporting the fee award. These findings cannot be clearer and no more need be added. This Court can easily review the basis from which the fees were awarded on remand.[i]

E. Proportionality Doctrine Not Applicable.

As noted above, the attorney fee award was based only on those incurred to prepare for the issues heard at trial and the actual trial time. They were already proportioned. ***Loeffelholz v. Citizens for Leaders,*** 119 Wn. App. 665, 82 P.3d 1199 (2004); ***King County v. Squire Inv. Co.,*** 59 Wn. App. 888, 801, P.2d 1022 (1990). Rielys' general claim the fees were unreasonable does not point out how. It was Riely that refused to give up their claim to an implied easement through Gunn's property. They forced the matter to trial even in the face of no express easement and their failure to properly plead the implied easement claim. Their position at trail was unreasonable.

There is no basis for an offset because Riely did not prevail at trial on the easement issue. Further, Riely themselves fail to proportion or

segregate their fees. They lost at trial, at which no evidence concerning damages was necessary. Thus, their "proportioned" fees for damages must be minimal. Their attempt to offset Gunn's entire award based on their puffed up claim is amazing. As damages were stipulated prior to trial, their offset should be a miniscule fraction of time necessary to stand up and enter the stipulation on the record.

F. Treble Damages Supported by the Record.

The Trial Court's findings support the treble damage award under RCW 64.12.030 given on remand. Treble damages are allowed when one damages another's trees "without lawful authority." RCW 62.12.030. The Trial Court, after hearing a two day trial and evaluating the witnesses, on at least two occasions found Riely's tree removal was wrongful and without lawful authority. It rejected Rielys' claim to mitigating circumstances under RCW 64.12.040. Contrary to Rielys' objection and assertions that they were justified in trespassing, the Trial Court, after listening to all the evidence, including the testimony of Mr. Sissen and both Riely, found Riely had no reasonable basis to think they had an easement through Gunn's property and certainly no right to cut down Gunn's trees.

Riely is rearguing the factual matters presented to the Trial Court. However, appellate courts defer to the Trial Court's credibility findings

and evidence weight, ***In re Welfare of Sego,*** 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973), and will not substitute its judgment for the Trial Court, even if it would resolve the factual dispute differently. ***Sunnyside Valley Irrigation Dist. V. Dickie,*** 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). The Trial Court's findings that Rielys' actions were wrongful and unreasonable are supported by the record and must stand. ***In re Estate of Lint,*** 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

The treble damage award was appropriate.

G. No Implied Easement Could Be Proven.

Riely rehash before this Court the implied easement issue to justify their trespass and challenge the trial and remand Court's findings that their conduct was wrongful entitling Gunn to treble damages and attorney's fees in equity. However, a review of the proven facts show Riely never had a valid claim to an implied easement.

Joel & Melissa Sisson and Donald & Dorothy Goralski owned the entire 86.16 track of land before they subdivided it. CP 177–178. Prior to their purchase, the property was part of a 800 acre farm. CP 203, Lines 21-23, RP 150, Lines 20-21, RP 221, Lines 8-15. It is black letter law that one cannot have an easement over one's own property. Assuming the grassy path was used during farming to traverse between what are now separate parcels, such use did not create an implied easement as there was

no dominant or servient estate as the property was one big holding. RP 38.[ii] Even assuming separate parcels and an implied easement, when the property containing Gunn's and Rielys' property was sold to Sisson and Goralski the implied easement merged and was extinguished. "Where the dominant and servient estate of an easement come into common ownership, the easement is extinguished." ***Radovich v. Nuzhat,*** 104 Wn. App. 800, 16 P.3d 687 (2001), ***Hanna v. Margitan,*** 193 Wn. App. 596, 373 P.3d 300 (2016).

After the subdivision and at the time Gunn purchased his property, the only way to create an easement over the grassy path was by an express grant incorporated into the short plat or subdivision or by a reservation in Gunn's deed. This was not done. Sisson's later statements to Riely alone could not create a good faith belief that an easement existed through Gunn's property over the grassy path. Riely never had a good faith claim to an implied easement.

Finally, the implied easement claim is now barred by res judicata. This doctrine bars recovery for causes of actions that could have been asserted in a prior case, whether they were or not, in the prior action between the same parties. ***Hisle v. Todd Pacific Shipyards Corp.,*** 113 Wn. App. 401, 54 P.3d 687, 692 (2002). It applies where there is a concurrence of identity in (1) the subject matter; (2) the cause of action;

(3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. ***Id. (citing Déjà vu-Everett Federal Way, Inc. v. City of Federal Way,*** 96 Wn. App. 255, 262 979 P.2d 464 (1999). In this case all four elements would be met if Riely sued seeking an implied easement through Gunn's property. They could have timely pled that issue in the first suit but failed to do so; the parties would be the same as well as the witnesses that testified at the first trial; the issue itself was heard by the Trial Court as an affirmative defense which failed. Simply put, the implied easement issue is precluded from being raised again by res judicata.

H. Riely Not the Prevailing Party under Either RCW 4.84.250 or CR 68.

The primary reason for RCW 4.84.250 and CR 68 is to avoid needless litigation. ***See McGuire v. Bates,*** 169 Wn.2d 185, 234 P.3d 205 (2010), ***McKillop v. Pers. Representative of the Estate of Carpine,*** 192 Wn. App. 541, 369 P.3d 161 (2016); ***See also Allianceone Receivables Mgmt., Inc. v. Lewis,*** 180 Wn.2d 389, 325 P.3d 904 (2014). Neither Rielys' settlement offer nor offer of judgment dealt with their easement claim and did not settle all claims in the suit. CP 42-45, CP 64-66. Riely lost after trial. Therefore they cannot be deemed prevailing parties entitled to an award of attorney's fees. ***Cf Lassek v. Jenbere,*** 169 Wn. App. 318,

279 P.3d 969 (2012). Riely deliberately refused to admit they had no easement through Gunn's property when they made their offers of judgment and settlement. This omission did not settle the only issue for trial requiring the matter to go forward. CP 21.

Rielys' offers do not meet the intent or spirit of the statute or court rule justifying them an award of attorney's fees. Offers, such as the Rielys', which were never intended to resolve the main issue, cannot be used to reward such litigants. Gunn would never have tried the case if Riely had given up their easement claim and the only issue left was damages. CP 65.

Just as the statute of frauds should not be used to perpetuate fraud, ***Firth v. Lu,*** 103 Wn. App. 267, 12 P.3d 618, 624 (2000), RCW 4.84.250 and CR 68 should not be used to punish a party who is forced to litigate the only issue for trial, an equitable claim, when the damages claims were minimal and settled before hand.

I. Respondent Entitled to Award of Attorney's Fees and Costs on Appeal.

Gunn requests an award of attorney's fees and costs for this appeal. RAP 18.1(a) provides:

> "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either of the Court of

> Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specified that the request is to be directed to the trial court.”..

Equity again justifies this Court awarding Mr. Gunn fees for this appeal. Rielys' claim that they have an easement through Gunn's property is without any basis. Neither an express nor an implied easement can be proven. Their actions resulting in this suit were willful, wanton and in bad faith. Gunn has been forced to continually spend money to defend his property and protect the award given him by the Trial and Remand Courts.

This case cries for an award of fees in favor of Gunn. He did nothing wrong. He was forced to defend his property rights from an intentional and unreasonable intrusion. Riely took the "shoot first and ask questions later" position by intentionally trespassing onto Gunn's property to destroy the trees knowing they had no legal or equitable basis for doing so. They forced Gunn to sue and incur fees to have a court rule Riely had no reasonable basis for claiming any easement and thereby stopping the encroachment. Since the Remand Court properly found equitable principals to award attorney fees after trial, this court can use the same theory to award fees on appeal. RAP 18.1(a), ***Public Utility Dist. No. of Snohomish County,*** 86 Wn.2d 388, 545 P.2d 1 (1976); ***Quality Food Centers v. Mary Jewell T, LLC,*** 134 Wn. App. 814, 142 P.3d 206 (2006); ***Baird v. Carson,*** 59 Wn. App. 715, 719, 801 P.2d 247 (1990).

To say no fees are available in equity under these egregious circumstances will open the door to people cutting down neighbor's trees blocking views or for other nefarious reasons with the knowledge they may only be liable for treble the stumpage value. The use of equity in this situation is not only warranted but needed to protect people like Gunn.

Mr. Gunn should be awarded attorney's fees and costs on this appeal.

IV. CONCLUSION

This Court should affirm the remand court's ruling and award Gunn attorney's fees and costs on appeal.

DATED this 27th day of September, 2016.

BELL & DAVIS PLLC

By: _____
W. JEFF DAVIS, WSBA#12246
Attorney for Robert Gunn, Respondent

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[i] This court can review the actual trial through the Report of Proceedings, the Trial Court's oral ruling, CP 175-200, the Trial Court's Memorandum Opinion and Order Re: Defendants' Motion for Reconsideration, CP 334-337, the Remand Court's Memorandum on Remand, CP 165-169, the Remand Court's Memorandum Opinion on Motion for Reconsideration, CP 113-118, together with the written findings of fact and conclusions of law both at trial, CP 275—290, and on remand, CP 122-126.

[ii] Testimony of Wengler starting at line 8: "Because the survey is a part of a subdivision, a large lot subdivision, and all those parcels were created simultaneously. So therefore, they don't have a really a junior/senior, right . . . "

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ROBERT GUNN, a single man, Respondent,
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TERRY L. RIELY and PETRA E. RIELY, Husband and Wife and their Marital Community and all Persons Claiming Any Legal or Equitable Right, Title, Estate, Lien or Interest in the Property Described in the Complaint Adverse to Plaintiff's Title, or Any Cloud on Plaintiff's Title Thereto, Appellants.

PROOF OF SERVICE

BELL & DAVIS PLLC

By:
W. JEFF DAVIS, WSBA#12246
Attorney for Respondent

I, Mindy Davis, certify under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a legal assistant to W. Jeff Davis, attorney for Respondent, Robert Gunn, over the age of 18 and not a party to this action. My business address is 433 N. 5th Ave., Suite A, PO Box 510 Sequim, WA 98382.

On September 27, 2016, I deposited in the mails of the Unites States Postal Service, a properly stamped, first class addressed envelope containing true and correct copies of the following documents:

(1) Brief of Respondent; and (2) Proof of Service

addressed to:

Counsel for Appellants Riely:

Law Office of Curtis G. Johnson, PS
Curtis G. Johnson, Esq.
230 E. 5th St.
Port Angeles, WA 98362

Appellate Court Clerk, Division II:

David C. Ponzoha, Court Clerk
Washington State Court of Appeals II
950 Broadyway, Suite 300
Tacoma, WA 98402-4454

DATED this 27th day of September, 2016.

Mindy Davis, Legal Assistant